

PUBLIC CONTRACTS REVIEW BOARD

Case No. 804

CPSU 3383/ 2014

Semi Invasive Cardiac Output Unit, Accessories and Consumables.

The tender was published on the 12th September 2014. The closing date was the 13th October 2014. The estimated value of tender is €59,921.40(Inclusive of VAT).

Four (4) bids from two bidders had been received for this tender.

On the 10th March 2015 Drugsales Limited filed an objection against the decision of the contracting authority to award the tender to Associated Equipment Limited for the amount of €69,804.35.

The Public Contracts Review Board composed of Dr Anthony Cassar (Chairman), Dr Charles Cassar and Mr Lawrence Ancilleri as members convened a hearing on Tuesday 5th May 2015 to discuss the objection.

Present for the hearing were:

Drugsales Limited:

Ms Giulia Attard Montalto	Representative
Mr Philip Moran	Sales Manager
Ms Dagmar Slivlova	Representative
Dr Andrea Gera de Petri	Legal Representative

Associated Equipment:

Mr Raymond Tonna	Director
Mr Keith Vassallo	Representative

Central Procurement and Supplies Unit:

Ms Alicia Vella Lethridge	Chairperson Evaluation Board
Ms Josette Camilleri	Secretary Evaluation Board
Mr Carmelo Sacco	Representative
Ms Mariella Cutajar	Representative
Ms Connie Miceli	Representative

The Chairman Public Contracts Review Board made a brief introduction and the appellant's representative was invited to make his submissions on the objection.

Dr Andrea Gera de Petri on behalf of the appellant contended that only appellant's offer was compliant with the tender conditions. According to a clarification issued and forming part of the tender, the consumables had to be "Flowtracks". This is a propriety brand and in order to comply with the clarification, appellant had submitted this Flowtrack. He continued that only one firm made the real-time animation monitor, Edwards. Therefore it follows that the monitor had to be also of the brand name Edwards. For this reason appellant believes that the preferred bidder's offer was non compliant. He contended that the only monitor from Edwards that matches the tender specifications was the EV 1000.

Ms Carmen Tabone for the contracting authority explained that since FloTrac was a propriety name, she could not accept that since it would if she did, either she would be restricting the contracting authority in the choice, or else going against fair competition. The equipment offered by the preferred bidder was compliant. There were four offers for this tender - two from the appellant firm and two from the preferred bidder. Of these offers one each from the appellant and the preferred bidder failed to be accepted. But both the appellant and the preferred bidder had an offer that was according to specifications and was accepted for the financial evaluation. She declared that the tender document did not ask for "FloTrac", this word could not be found anywhere in the tender.

Ms Alicia Vella Lethridge for the contracting authority explained that the word FloTrac was used in the clarification number 1.

Mr Carmelo Sacco for the contracting authority explained that presently FloTrac is being used by the contracting authority.

Ms Carmen Tabone for the contracting authority replying to questions by the chairman said that the preferred bidder's equipment did not have FloTracs, while the appellant's equipment had FloTrac.

The Chairman remarked that the clarifications form part of the tender document and if a clarification mentioned FloTrac, the tender mentioned FlowTrack.

Dr Andrea Gera de Petri for the appellant insisted that the monitor offered by the preferred bidder is non compliant since it did not provide real-time animation. He declared that appellant could have submitted other equipment but because of the clarification had limited their offer to equipment with FloTrac.

Mr Vella Lethridge for the contracting authority replying to questions by the Chairman confirmed that the preferred bidder's equipment did not have FloTrac.

Mr Keith Vassallo for the preferred bidder explained that the preferred bidder had not offered FloTrac because this was a propriety brand of Edwards. The preferred bidder had offered ProAc which gives the same results as FloTrac, and in doing so, the preferred bidder had complied with the tender document as published. He claimed that his firm did not manage to download clarification number 1 but only succeeded to download clarification number 2 which dealt with the sizes of the monitors. He contended that the original tender was correct in not mentioning FloTrac because this is a brand name and to use it would be unfair

competition.

The Chairman asked the contracting authority why was the word Flow track used in the clarification.

Ms Alicia Vella Lethridge explained that the word had been used so much that it became a generic word and not a propriety one, like for example, using Hoover for vacuum cleaner.

Dr Andrea Gera de Petri for the appellant said that the wording of the clarification could not be understood in the sense that other equipment without FloTrac was acceptable.

At this point the hearing was closed.

This Board,

Having noted the appellant's objection in terms of the "Reasoned Letter of Objection" dated 10th March 2015 and also through the appellant's verbal submissions during the hearing held on 5th May 2015 had objected to the decision taken by the pertinent authority, in that:

- a) The appellant contends that its offer was the only compliant offer as the consumables had to be "FlowTracks". In this regard, the appellant maintains that the preferred bidder was non compliant, since the latter's offer did not provide an equipment with "Flow Tracks".**

Having considered the contracting authority's verbal submissions during the hearing held on 5th May 2015 in that:

- a) The contracting authority maintains that "FloTrac" was a trade mark and in this regard, the Evaluation Committee could not accept the brand name to limit the scope of competition and in this regard, the same committee decided to ignore this factor;**
- b) The contracting authority confirms that, presently, the "FloTrac" system is being used by the Contracting Authority, the latter also confirmed that in Clarification Number 1, it has affirmed that the equipment had to have "FlowTrack";**
- c) The contracting authority also explained to the Public Contracts Review Board that the word "FlowTrac" is a generic word and not a brand name.**

Reached the following conclusions:

- 1. This Board would, first of all, clarify the fact that any clarification and recognition of same by the Evaluation Board of the Contracting Authority does in actual fact form part of the Tender Document. When clarifications are made by the Contracting Authority, the latter are made to clarify a part of a tender condition. In this regard, this Board justifiably opines that the clarification used whereby it was confirmed by the contracting authority that the equipment had to have a "FlowTrack" system, formed a mandatory part of the Tender Document. This Board also credibly notes that the appellant's bid was compliant in**

conformity with the contracting authority's request for clarification number 1. In this regard, this Board upholds the appellant's contention;

- 2. This Board, noted clarification no. 1 and it is credibly convinced that the answer given by the contracting authority was clearly stated as "flowtracks sets and cables". In this regard, this Board re-affirms that clarification no. 1 did form part of the Tender Document and did in fact state that the consumables had to be "flowtracks". The clarification itself did not indicate that alternative equipments without flow tract was acceptable to the contracting authority;**
- 3. From submissions made by the Contracting Authority, this Board is justifiably convinced that the preferred bidder's equipment did not have FloTrac.**

In view of the above, this Board finds in favour of the appellant company and recommends that:

- i) The appellant's offer be reintegrated in the evaluation process and;**
- ii) The deposit paid by the appellant company be reimbursed.**

Dr. Anthony Cassar
Chairman

Dr. Charles Cassar
Member

Mr. Lawrence Ancillieri
Member

14 May 2015